No. 14,432
(and Consolidated Cases Nos. 14,432–14,440
and Nos. 14,442–14,446)
No. 14,441

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

DIX BOX COMPANY AND BENJAMIN DIX, DOING BUSINESS AS DIX BOX COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN CARVAJAL, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

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INDEX

CITATIONS

In Part III of their brief on this appeal the appellees have contended that the Government had no power to recover in a civil action for the overcharges alleged in these cases, and that in any event the Government has failed to establish its right to any damages. Because we regard these contentions as erroneous, and inasmuch as they concern issues not dealt with in the Government's initial brief, we file this reply brief directed at that part of the appellees' argument.

1. In its complaint the Government alleged that each of the purchasers of containers in the transactions complained of "purchased the same in the course of trade or business" (R. Dix 5). The appellees contend that in these circumstances the Defense Production Act makes no provision for any action for damages by the Government. They assert that the Government's right to sue under Section 409(c) is limited to cases in which the purchaser has bought the controlled material or service for use or consumption other than in the course of trade or business. This construction of the statute is clearly in error, and conflicts squarely with decisions of this Court interpreting an almost identical provision of the Emergency Price Control Act. *Bowles* v. *Glick Brothers Lumber Company,* 146 F. 2d 566, certiorari denied, 325 U.S. 877, rehearing denied, 326 U.S. 804; *Bowles* v. *Ray,* 146 F. 2d 652, certiorari denied, 325 U.S. 875; see also *Augustine* v. *Bowles,* 149 F. 2d 93.[1]

[1] The critical phrases in the Defense Production Act:

"* * * the person who buys such material or service for use or consumption other than in the course of trade or business

It is true that Section 409(c) permitted only those private parties to bring suit whose purchases had been for use or consumption other than in the course of trade or business. Commercial buyers were considered in *pari delicto* and were given no right to recover for themselves. But the Government was authorized to sue for overcharges both when a purchaser who could have brought the action had not done so within thirty days, and when the purchaser was one who was "not entitled for any reason to bring the action." Thus the Government could recover whether the sale had been to a consumer who was entitled to bring suit himself or to a commercial user who was not. The only difference was

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> may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge"

and

> "and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such one-year period"

are identical to those in Section 205(e) of the Emergency Price Control Act with the exception that in the latter the word "commodity" appears in place of "material or service" and the word "Administrator" in place of "President".

The appellees cite, in support of their contention, *United States* v. *Yaffe*, 113 F. Supp. 382 (E.D. Okla.) where Judge Wallace stated that it might be questioned whether the Government could recover for overcharges on purchases made in the course of trade or business. The statement was dictum inasmuch as the decision denying recovery to the Government was rested on another point, and it may be noted that three days later, sitting in another court, Judge Wallace, without mentioning the issue, granted the Government recovery with respect to purchases of the same commodity involved in *Yaffe* made in the course of trade or business by one of the same purchasers. *United States* v. *Saunders*, 113 F. Supp. 386 (W.D. Okla.), reversed on other grounds, 214 F. 2d 744 (C.A. 10).

that in the former case the Government must first allow the aggrieved private party thirty days in which to bring his own action. After thirty days, the nature of the purchase was immaterial to the Government's right to sue.

In the instant case, there was testimony to substantiate the Government's allegation that the purchasers involved in the transactions complained of had bought the containers in the course of their trade or business (R. Dix 30-80). The trial court, however, ruled that this proof was not needed, and that "it is only necessary for the government to establish the fact that the wooden containers were sold, and after they were sold and delivered, I am not interested in what happened to them" (R. Dix 54). In view of this ruling, which the appellees have not contested in their brief, the Government's right to bring this suit seems clearly established.

Moreover, it appears that the Government was entitled to bring this action regardless of the nature of the purchases. For the appellees admitted in the Stipulation as to Remaining Issues—filed more than a year after any of the alleged violations—that they knew of no actions brought by a purchaser within thirty days after any of the sales involved (R. Dix. 14). The Government moved to amend its complaint in this respect (R. Dix. 54) but the trial judge, having previously stated his opinion that this was a matter of defense (R. Dix. 47-48) and having held that the Government had to prove no more than the fact of the sales (which were stipulated, R. Dix 14), asked that this motion and any others be postponed until after the evidence was in (R. Dix. 54). At the close of evidence, the judge, after a brief and unrecorded col-

loquy, immediately announced his decision in favor of the defendants (R. Dix. 245). At this point a renewal of the motion to amend would obviously have served no useful purpose.

In the light of these facts, it seems clear that the Government has established its right to sue for these overcharges. But should this Court believe otherwise, we respectfully submit that, the decision below having been made on other grounds after rulings in the Government's favor on this question, the case should be remanded for a further trial on this issue.

2. The Government brought these actions to recover for overcharges received by the appellees in excess of ceiling prices between May 5, 1952, and January 31, 1953. The number of sales and the prices charged during that period were stipulated prior to trial (R. Dix 13-14), and no other evidence was introduced with respect to the amount of these sales. The appellees contend that inasmuch as the trial judge found that all ceilings with respect to the appellees were removed on January 20, 1953, the Government has failed to prove that it is entitled to any damages, because it did not submit any evidence on the basis of which the trial court could have differentiated between sales prior to January 20, 1953, and sales subsequent thereto.

There is no basis in the record for finding that price regulations with respect to the appellees expired on January 20, 1953. The Government in its complaint alleged that Ceiling Price Regulation 142 continued in full force and effect through February 16, 1953 (R. Dix 4). The Stipulation as to Remaining Issues stated the Government's contention "that CPR 142 was valid, and in full force and effect during this pe-

riod" (R. Dix 16). The issue which the appellees now raise was not mentioned during the trial, and the question of the date of the regulation's termination arose only incidentally in connection with an attempt to place the time at which investigation of the alleged violations had begun. The Assistant United States Attorney erroneously stated in answer to a question during a colloquy that the appellees' ceilings went off on January 18, 1953 (R. Dix 204). Don F. Clark, a former enforcement attorney for OPS, called by the appellees, stated only that the regulations governing the appellees were lifted in "the last two weeks of January" (R. Dix 209). Even though he stated that January 18—a date apparently rejected by the trial court—"would be very close", there was nothing in his testimony that would permit a definite finding that the regulation expired before the end of the last two weeks of January, *i.e.,* January 31, 1953.

CPR 142 was issued April 29, 1952, and was published in the Federal Register, 17 F.R. 3822. If the appellees desired to prove that this regulation had ceased to have any effect before the end of the period for which the Government was bringing suit, it was clearly incumbent upon them to show by what action and under what authority it was terminated. This they failed to do. Moreover, it affirmatively appears that the regulation did not expire before that time. On September 3, 1952, General Overriding Regulation 34 was published in the Federal Register. 17 F.R. 7981. This regulation, effective August 29, 1952, stated:

> All lumber items, wood products, and connected services totally exempted from price control will be included in this General Overriding Regula-

> tion. It is contemplated that OPS will publish a number of exemption actions pertaining to lumber, wood products, and connected services, and the issuance of this GOR at this time serves to establish a single document for the listing of such actions.

Thus any order rescinding CPR 142 should be found as a part of GOR 34 or as an amendment thereto. But there is nothing in that Regulation in its initial form or in its first seven amendments which affects the force and effect of CPR 142.[2] Nothing of this nature appears until February 18, 1953, when OPS issued Amendment 8 to GOR 34, which declared (18 F.R. 1010, 1011):

> All lumber and wood products and allied commodities and services covered by the Forest Products Division of the Office of Price Stabilization and sold in the continental United States, and its territories and possessions such as, but not limited to, logs, lumber, veneer, *containers,* turned and shaped wood products, plywood, treated and untreated poles and pilings, millwork, and logging and hauling services are hereby exempted from price control. [Emphasis supplied.]

Thus it is clear that CPR 142 was in full force and effect throughout the period during which the overcharges upon which the United States has brought these actions occurred.

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[2] 17 F.R. 7981; Amendment 1, September 25, 1952, 17 F.R. 8581; Amendment 2, October 17, 1952, 17 F.R. 9242; Amendment 3, November 12, 1952, 17 F.R. 10299; Amendment 4, January 9, 1953, 18 F.R. 228; Amendment 5, January 28, 1953, 18 F.R. 630; Amendment 6, February 5, 1953, 18 F.R. 774; Amendment 7, February 5, 1953, 18 F.R. 775.

CONCLUSION

For the foregoing reasons, together with the reasons stated in our principal brief, it is respectfully submitted that the judgment of the court below should be reversed.

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